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No. 80-1606

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRICE ENTERPRISES, INC., ET AL.,
Petitioners,

v.

AMERICAN INTERNATIONAL PICTURES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. The Checking Reports Were Prepared in Contemplation of Litigation	2
II. The Rule of *Palmer* v. *Hoffman* Applies to the Checking Reports	4
CONCLUSION	6

TABLE OF AUTHORITIES

Cases

Crompton-Richmond Co. v. *Briggs*, 560 F.2d 1195 (5th Cir. 1977)	6
Johnson v. *United States*, 325 F.2d 709 (1st Cir. 1963)	6
L.C.L. Theatres, Inc. v. *Columbia Pictures Industries, Inc.*, 421 F.Supp. 1090 (N.D. Tex. 1976), aff'd in part, rev'd in part, 566 F.2d 494 (5th Cir. 1978)	3
Palmer v. *Hoffman*, 318 U.S. 109 (1943)	3, 4, 6
United States v. *Baxter*, 492 F.2d 150 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974)	5
United States v. *Evans*, 572 F.2d 455 (5th Cir. 1978), cert. denied, 439 U.S. 870 (1978)	5
United States v. *Pfeiffer*, 539 F.2d 668 (8th Cir. 1976)	5
United States v. *Reese*, 568 F.2d 1246 (6th Cir. 1977)	5

Other Authorities

Rule 803(6)—Federal Rules of Evidence ..... *passim*

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REPLY BRIEF FOR PETITIONERS *

INTRODUCTION

In their opposition, respondents do not dispute that documents prepared for use in litigation are inadmissible as "business records" under Rule 803(6), Fed. R. Evid. Rather, they rely almost entirely on the claim that the checking reports and related evidence in this case were not such documents. To support that view, they stress evidence that individual theater checkers knew nothing about the purpose of their activities (Br. in Opp. at 3-6), and argue that the prohibition against the use of self-serving business documents disappears whenever a business normally prepares the type of documents whose re-

* Petitioners are identified in the Petition at page 1. Petitioners have no additional parent companies, subsidiaries or affiliates.

liability is challenged (Br. in Opp. at 6-7).[1] Neither point has any merit.

I. The Checking Reports Were Prepared in Contemplation of Litigation

Although respondents earnestly contend that the checking reports were not prepared in contemplation of litigation, they are noticeably silent about the mysterious purpose for which they were prepared. In our view, the reports must be deemed litigation documents because their only conceivable purpose is to build a record for possible damage claims against exhibitors.

The costly process of conducting "open" and "blind" checks is not intended to duplicate exhibitors' reports of box office revenues. If exhibitors' reports were invariably accurate, the checking of theaters and the preparation of checking reports would be a pointless and redundant exercise. The activity of theater checking is

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[1] Respondents also suggest that the checking reports did not have to qualify as business records under Rule 803(6) because petitioners were given the opportunity to cross-examine some of the theater checkers. However, the testimony at trial of a handful of checkers—all selected by respondents—is hardly sufficient to overcome the persumption of unreliability that attaches to documents prepared for use in litigation. This is particularly true in view of specific indications that many of the checking reports were, in fact, inaccurate. Pet. at 4. Petitioners do not suggest that it was necessary to call as witnesses all of respondents' checkers. However, given the checkers' potential for bias and the specific doubts concerning the accuracy of the reports, the district court clearly erred in not requiring a more extensive and meaningful opportunity for cross-examination.

Similarly, respondents' position is not helped by the fact that petitioners did not themselves subpoena all or most of respondents' checkers to testify at trial. It was respondents' burden to prove their case by competent evidence, not petitioners' burden to disprove the case with witnesses that respondents declined to call. Moreover, it is frequently the case when hearsay evidence is offered that the out-of-court declarant could be called as a witness by the party against whom the hearsay is offered. Respondents' suggested exception would effectively eliminate the rule.

instead designed to detect instances of underreporting of revenues, and to develop evidence against exhibitors in the event underreporting is found. It is instructive to note that the checks were conducted at the behest, not of respondents' officers or accountants, but of their New York law firm, a circumstance that strongly suggests their ultimate purpose.

Respondents nonetheless emphasize the testimony of some checkers that they did not know the purpose for which their reports were being made (App. 243-244; 288; 359).[2] These individuals may have lacked detailed knowledge of the use to which their records might be put. However, they were certainly aware of the general purpose of their jobs. They were instructed to enter petitioners' theaters undercover as paying customers, and to conceal their activities from the theater managers. The checkers therefore knew that the interests of their clients were adverse to the interests of the exhibitors. Under the circumstances, the purpose of the checking activity could have escaped only the most dim-witted checker.

It is clear, then, that the process of theater checking is designed to collect evidence of underreporting for possible litigation against exhibitors. Respondents have nowhere suggested any other purpose that the checking might serve, and we submit that there is none. Accordingly, the checking reports lacked the indicia of trustworthiness and reliability needed to exempt the checkers from cross-examination under Rule 803(6).[3]

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[2] Record references are to the Appendix in the United States Court of Appeals for the Fourth Circuit.

[3] Respondents rely heavily on the district court opinion in *L.C.L. Theaters, Inc.* v. *Columbia Pictures Industries, Inc.*, 421 F. Supp. 1090 (N.D. Tex. 1976), *aff'd in part, rev'd in part*, 566 F.2d 494 (5th Cir. 1978), a case involving similar facts. However, the district court in that case did not consider the issue of the admissibility of the checking reports under Rule 803(6), and did not discuss *Palmer* v. *Hoffman*, 318 U.S. 109 (1943).

II. The Rule of *Palmer* v. *Hoffman* Applies to the Checking Reports

Respondents also claim that documents for litigation are saved from exclusion under *Palmer* v. *Hoffman*, 318 U.S. 109 (1943), simply because they are prepared routinely, or because the preparation of such documents is the function or business of the persons who made them. There are no such exceptions to the *Palmer* rule.

Like the district court below, respondents attempt to confine *Palmer* to reports of "unique" or "extraordinary" occurrences that are not documented as part of the defendant's business routine. That is a plain misreading of *Palmer*. The engineer's accident report that was excluded in *Palmer* was objectionable not because of the infrequency of railroad grade-crossing accidents; on the contrary, the Court reasoned that the hearsay exception created by the business records rule could not be expanded to admit self-serving documents simply on the basis that they were prepared systematically, or as a regular part of the defendant's business.

The Court stated that "the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made 'in the regular course' of . . . business . . ." 318 U.S. at 113. The Court observed that, if the rule were otherwise, "any law office in the land could follow the same course" by making a " 'business' " out of "[p]reparation of cases for trial . . ." *Id.* Such an interpretation of the business records rule, the Court concluded, would open "wide the door to avoidance of cross-examination." *Id.* at 114.

The verification companies employed by respondents to conduct theater checks are in the same position as the law firms discussed in *Palmer*. Both are in the business of preparing documents for use in litigation. The regularity of the documents' preparation is not doubted. Nonetheless, the purpose for which the documents are made de-

prives them of the "earmarks of reliability" which *Palmer* demands. 318 U.S. at 114. Like documents prepared by lawyers for trial, the checking reports cannot qualify as business records because "they are calculated for use essentially in the court, not in the business." *Id.*

The court of appeals decision relied on by respondents, *United States* v. *Baxter*, 492 F. 2d 150 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974), is not to the contrary. The Ninth Circuit in that case expressly recognized that "business records prepared specifically to assist in imminent litigation are unreliable, because they are likely to be self-serving in a way that cannot be scrutinized by cross-examination at trial." 492 F. 2d at 165. The court approved the admission of the documents—record entries of illegal drug sales—precisely because the preparation of the records served a purpose *other than* the development of evidence for trial. *Id.* The incriminating records were used and relied on by the defendants in the conduct of a business which, although illicit, did not have as its purpose the preparation of evidence for use in litigation. The documents were thus properly admitted because their business purpose provided an independent check on the accuracy and reliability of the documents' contents.

In the instant case there is no independent business purpose served by theater checking, and the verification companies therefore have no independent reason to assure the accuracy of their checkers' reports. Because the only purpose of theater checking is the building of a record for possible litigation against exhibitors, the reliability or weight of the checking reports is not a question for the trier of fact, as contended by respondents.[4]

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[4] Respondents rely on a number of court of appeals decisions for the proposition that objections to the reliability or accuracy of business records go to the weight to be given such records, not to their admissibility. *United States* v. *Reese*, 568 F.2d 1246 (6th Cir. 1977); *United States* v. *Pfeiffer*, 539 F.2d 668 (8th Cir. 1976); *United States* v. *Evans*, 572 F.2d 455 (5th Cir. 1978), *cert. denied*,

The *Palmer* decision leaves no room for admission of litigation documents subject to a cautionary instruction to the jury. Such documents are inadmissible because of the purpose of their preparation, and they therefore cannot qualify as business records under Rule 803(6).

CONCLUSION

For the foregoing reasons, the instant petition should be granted.

Respectfully submitted,

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439 U.S. 870 (1978); *Crompton-Richmond Co.* v. *Briggs*, 560 F.2d 1195 (5th Cir. 1977); *Johnson* v. *United States*, 325 F.2d 709 (1st Cir. 1963). However, these cases do not involve records challenged on the grounds that they were prepared for use in litigation. This Court settled in *Palmer* that records of that type simply cannot qualify as business records within the traditional exception to the hearsay rule.